80-1295

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No. .....

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

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CORNET STORES, ET AL.,

PETITIONERS,

V.

AZIE TAYLOR MORTON, ET AL.,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Is the Court of Appeals in conflict with settled principles of application of federal court jurisdictional transfer statutes in denying a request for transfer from a United States District Court to the Court of International Trade, as recently authorized by the Customs Courts Act of 1980, Pub. L. 96-417, § 201, 94 Stat. 1729 (enacting 28 U.S.C. § 1584(a)), when the action is otherwise held to be within the exclusive subject matter jurisdiction of that court?

2. Do the "sole relief and remedy" prescriptions of Section 7(c) of the Trading With the Enemy Act prevail over the choice of means of exercise of TWEA authority selected by the Executive?

PARTIES TO THE PROCEEDINGS

CORNET STORES, ET AL.[1/],

PETITIONERS,

V.

AZIE TAYLOR MORTON, TREASURER OF THE UNITED STATES; W. MICHAEL BLUMENTHAL, SECRETARY OF THE TREASURY; GRIFFEN B. BELL, ATTORNEY GENERAL OF THE UNITED STATES; ROBERT E. CHASEN, COMMISSIONER OF CUSTOMS, UNITED STATES CUSTOMS SERVICE,

RESPONDENTS.

1/ Pursuant to Rules 21.1(b) and 28.1, the petitioning parties, thirty-one (31) in number, and their corporate relationships, if any, are as follows:

PARTY	RULE 28.1 RELATIONSHIPS
Cornet Stores	None
The Newman Co., Inc.	Parent Owner: Thrifty Corporation; Affiliates: Akron, Inc.; and, Crown Books, Inc.

(continued)

1/ (continued)

PARTY	RULE 28.1 RELATIONSHIPS
Alert Import Corporation	None
Michaud, Inc.	None
Amalfi Knitwear Corporation	None
Universal Accordian Factory	None
Bradshaw International	Parent Owner: Bradshaw, Inc.
Robert S. Osgood, Inc.	Parent Owner: Montague L. Meyers, Ltd.
Carter Hawley Hale Stores, Inc.	None
Pan Asiatic Trading Co., Inc.	None
Mutual Trading Co., Inc.	None
United Asia Trading Co., Inc.	None
House of Ideas, Inc.	Parent Owner: Mathias Investment Corp.

(continued)

1/ (continued)

PARTY	RULE 28.1 RELATIONSHIPS
Federal Fire Hose Manufacturing Co.	Recently changed corporate name to, National Firehose Corporation; but no Rule 28.1 relationships.
Walter Fleischer Company, Inc.	None
Zee Toys, Inc.	Parent Owner: Intex Corporation
Smith International, Inc., The Servco Company Division	Guide Smith International; Sidem, S.A.; Smith Brocas, L.A.; Smith International Gulf Services, Limited; Drilling Tools & Services, Sdn. Bhd.; Servicos & Manufacturas Industriales Talara, S.A.; Smith International Arabia; SRI Timor Oilfield Supplies & Equipment, Sdn. Bhd.; and, McEvoy Egyptian Equipment Company.

(continued)

1/ (continued)

PARTY	RULE 28.1 RELATIONSHIPS
Lighting Parts, Inc.	Bevel Glass of Calif., Inc.
Lloyds Electronics International	None
Quality Marble and Tile Distributors Incorporated, formerly known as Quality Marble and Tile Company, formerly known as Quality Marble and Granite Company	None
Corbell Imports, Inc., and Corbell Company	None
International Fashions	None
Teledyne Industries, Inc.	Parent Owner: Teledyne, Inc.; Affiliates: Teledyne Canada, Ltd.; Unicoa Corp.
Beck/Arnley Corp. of California	Parent Owner: Beck/Arnley Corp. of New York

(continued)

1/ (continued)

PARTY	RULE 28.1 RELATIONSHIPS
C.H.B. Foods, Inc.	None
California Merchandise Company	None
Voss International Company	None
Jensen Motors, Inc.	None
Bowman Industries	None
Frank D. Davis Company	None

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No. .....

IN THE

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OCTOBER TERM 1980

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CORNET STORES, ET AL.,

PETITIONERS,

V.

AZIE TAYLOR MORTON, ET AL.,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The petitioners seek a writ of certiorari to review final judgments of the United States Court of Appeals for the Ninth Circuit denying their motion to direct the trial court to transfer their actions to the United States Court

of International Trade, pursuant to the Customs Courts Act of 1980, Pub. L. 96-417, § 201, 94 Stat. 1729, and affirming the decision of the United States District Court for the Central District of California dismissing for lack of subject matter jurisdiction their actions exercising their sole remedies, as delimited by Section 7(c) of the Trading With the Enemy Act (50 U.S.C. App. § 7(c)), for recovery of monies taken by Executive action under Section 5(b) of that Act.

Opinions Below

The opinion and judgment of the United States Court of Appeals for the Ninth Circuit was issued and entered on November 6, 1980. Its Order denying the petitioners' motion to transfer to the United States Court of International

Trade was issued and entered on December 3, 1980, with a clerical correction being made on December 16, 1980. On January 7, 1981, the Court granted petitioners' motion to stay issuance of mandate, the mandate being stayed until January 22, 1981, this petition for a writ of certiorari to be filed in this Court by that date. Petitioners filed with the lower court a motion to further stay the mandate until January 30, 1981, on January 19, 1981. The lower court's opinion of November 6, 1980, will be published according to local Rule 21(a). Its order of December 3, 1980, will not be published[2/] according to that same local rule. The opinion and order of the Court below are reproduced in the

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2/ It seems possible that the order denying transfer may be appended to its published opinion, however,

Appendix to this petition at pp. 1a through 21a.

The United States Court of Appeals held that the exercise of powers delegated to the Executive by Section 5(b) of the Trading With the Enemy Act (50 U.S.C. App. § 5(b) (1970)), by means of exaction of a surcharge on imports pursuant to Presidential Proclamation 4074 of August 15, 1971, was a traditional customs regulation undertaking and, consequently, within the exclusive subject matter jurisdiction of the Customs Court by the intent of Congress expressed in 28 U.S.C. § 1582 (1970), as amended by Pub. L. 91-271, 84 Stat. 278, and 28 U.S.C. § 1340 (1970). The lower Court affirmed the trial court's holding that subject matter jurisdiction was exclusive to the Customs Court, but did

not otherwise discuss the opinion of the trial court.

The Court of Appeals denied the petitioners' motion, filed on November 14, 1980, to alter the judgment to direct the district court to transfer their cases to the United States Court of International Trade, the former Customs Court, by an order, without statement of reason, entered on December 3, 1980. The petitioners' motion, and the respondents' response in opposition thereto, are set forth in the Appendix hereto, beginning at p. 22a.

Jurisdiction

This Court has jurisdiction to review this case pursuant to 28 U.S.C. § 1254(1) (1970). The judgment of the United States Court of Appeals for the Ninth Circuit dismissing the peti-

tioners' case is dated and it was entered on November 6, 1980, and its Order denying the motion to alter the judgment to direct transfer, is dated and was entered December 3, 1980.

Statutory Provisions and Legislative Materials Involved[3/]

Customs Courts Act of 1980, Pub. L. 96-417:

Section 201, adding Section 1584(a) to Title 28, U.S. Code (94 Stat. 1729):

> "§ 1584. Cure of Defects
>
> (a) If a civil action within the exclusive jurisdiction of the Court of International Trade is commenced in a district court of the United States, the district court shall, in the interest of justice, transfer such civil action to the Court of International

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3/ Those statutes and materials not otherwise set forth here are set out in the Appendix hereto, beginning at p. 37a.

> Trade, where such action shall proceed as if it had been commenced in the Court of International Trade in the first instance."

Section 201, amending 28 U.S. Code, § 1581, and defining the jurisdiction of the United States Court of International Trade (94 Stat. 1729).

Section 701 (94 Stat. 1747), providing effective date for, inter alia, the new Section 1584(a), of Title 28, U.S. Code.

50 U.S.C. App. (1970):

> "Section 1. This Act /sections 1-6, 7-39 and 41-44 of this Appendix/ shall be known as the 'Trading With The Enemy Act'."
>
> (Brackets quoted.)

Trading With the Enemy Act, Section 7(c), 50 U.S.C. App. (1970):

"Section 7(c)

" * * *

"The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act /sections 1-6, 7-39 and 41-44 of this Appendix/, and in the event of sale or other disposition of such property by the Alien Property Custodian shall be limited to and enforced against the net proceeds received

therefrom and held by the Alien Property Custodian or by the Treasurer of the United States."

Trading With the Enemy Act, Section 9(a), 50 U.S.C. App. (1970).

Trading With the Enemy Act, Section 33, 50 U.S.C. App. (1970).

H. Rep. 96-1235 (96th Cong., 2d Sess. 1980), excerpts therefrom as pertinent to Section 701 of the Customs Courts Act of 1980, and the effective application of the new Section 1584, Title 28, U.S. Code.

28 U.S.C. § 1406 (1970) in pertinent part:

"§ 1406. Cure or waiver of defects

"(a) The district court of a district in which is

filed a case laying venue in the wrong division or district shall dismiss, or if if be in the interest of justice, transfer such case to any district or division in which it could have been brought.

"(b) Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue.

"(c) If a case within the exclusive jurisdiction of the Court of Claims is filed in a district court, the district court shall, if it be in the interest of justice, transfer such case to the Court of Claims, where the case shall proceed as if it had been filed in the Court of Claims on the date it was filed in the district court.

" * * * "

Statement of the Case

This is a case of first impression involving transfer of an action from the United States District Courts system to other specialized federal courts having exclusive subject matter juris-

diction of the action. The transfer that is sought is that authorized by the newest jurisdictional transfer statute, enacted in October 1980, for the United States Customs Court, renamed the United States Court of International Trade by that same legislation, the Customs Courts Act of 1980.

The case arises out of litigation which found and held that the validity and sole Constitutional authority for the action of the Chief Executive in decreeing the exaction of monies amounting to ten percent (10%) ad valorem on diverse dutiable merchandise importations, in Presidential Proclamation 4074, of August 15, 1971, existed only in the Trading With the Enemy Act, 50 U.S.C. § 1, et seq. (1970) (hereinafter cited as TWEA), and Section 5(b) thereof. United

States v. Yoshida International, Inc., 526 F. 2d 560, 63 CCPA 15, C.A.D. 1160 (1975). That case was followed by another case identical in all respects, including resolutions, except as to parties and merchandise, but in which, however, an application was made to this Court for review of the Constitutionality issue. Certiorari was denied. Alcan Sales, Div. of Aluminum Corp. v. United States, 534 F. 2d 921, 63 CCPA 83, C.A.D. 1170, cert. den., 429 U.S. 986 (1976).

In consequence of those decisions, and in contemplation of the provisions of Sections 7(c) and 9(a) of the TWEA, the petitioners brought some eighteen (18) actions in the United States District Court for the Central District of California, seeking return of the monies taken from them pursuant to the

authority of the TWEA. Jurisdiction was alleged to exist in that District Court by reason of the TWEA; 28 U.S.C. §§ 1337, 1361 (1970); and, 28 U.S.C. §§ 1331 and 1391(e) (1970), as amended by the Act of October 21, 1976, Pub. L. 94-574, 90 Stat. 2721. The Respondents herein moved for dismissal on tne grounds of lack of subject matter jurisdiction, alleging that exclusive jurisdiction was vested in the United States Customs Court. That motion was granted by the District Court. The eighteen (18) actions were consolidated for purposes of disposition of the subject matter jurisdiction question, and for appeal to the United States Court of Appeals for the Ninth Circuit.

Briefing and oral argument in the Court of Appeals was completed in May

1980. On October 10, 1980, the Customs Courts Act of 1980 (Pub. L. 96-417, 94 Stat. 1727), was approved. On November 5, 1980, counsel for the petitioners, appellants in the lower court, mailed a letter to the Clerk of the Court of Appeals, with a copy to counsel for the Respondents, pointing out the recent passage of that legislation and its significant affect on the jurisdiction of the Customs Court, renamed the Court of International Trade. That letter is set forth in the Appendix hereto, at p. 47a. On Novmeber 6, 1980, the Court of Appeals filed its Opinion affirming the dismissal, and holding that the Customs Court has exclusive subject matter jurisdiction of the case. The Court of Appeals on December 3, 1980, also denied, without discussion, the Peti-

tioners' motion, filed on November 4, 1980, to alter the judgment to direct the District Court to transfer the case to the successor to the Customs Court, the Court of International Trade.

Reasons for Granting the Writ

In denying, without stated or implied reason, the request for transfer to the court held to have exclusive subject matter jurisdiction of this case, the Court of Appeals has decided a federal jurisdictional transfer question that is in conflict with a decision of this Court on a federal venue transfer question that is controlling of jurisdictional transfer questions. The lower court's decision introduces confusion and doubt where there had been uniform application of federal question transfer statutes as among the federal courts of

appeal. As a case of first impression involving Congresses' most recent jurisdictional transfer enactment, the lower court's decision puts in continuing question the realization of the purpose of this and a related federal question jurisdictional transfer statute. The efficient and uniform administration of justice calls for its quick resolution.

In the absence of deleterious delay or clear statutory evasion, it has been the rule, following principles announced by this Court, to liberally construe and order transfers as between district courts and, as pertinent here, as between district courts and other federal courts of specialized jurisdiction. The decision of the court below is contrary to those principles, and introduces procedural difficulties the transfer

statutes and those principles are intended to remove from the path of a decision that reaches the merits of a case.

The substantive decision of the court below on subject matter jurisdiction sanctions an exception to the TWEA sole remedy prescriptions of Congress, created only by the Chief Executive's choice of means of implementing TWEA authority. This is an issue of Constitutional authority that is contrary to this Court's construction of the TWEA, to the appellate court decisions on the Constitutionality of the exercise of TWEA authority, and a continuing threat to authority of the Congress itself.

ARGUMENT

1. THE DECISION DENYING TRANSFER INAUGURATES THIS TRANSFER STATUTE IN A MANNER THAT CONFLICTS WITH A DECISION OF THIS COURT AND DECISIONS OF OTHER COURTS OF APPEAL ON A SUBSTANTIALLY IDENTICAL STATUTE

In Goldlawr, Inc. v. Heiman, 369 U.S. 463 (1962), this Court sought to settle a conflict between the Courts of Appeal as to whether a district court could direct a transfer to another district court, under 28 U.S.C. § 1406(a), if the transferor court did not already have personal jurisdiction over the defendants (369 U.S., at 464). In holding that such a transfer for venue purposes was authorized by that statute, this

Court made its decision with words which are the principles which guide the lower courts in venue transfer questions, as follows:

> " * * * The problem which gave rise to the enactment of the section was that of avoiding the injustice which had often resulted to plaintiffs from dismissal of their actions merely because they had made an erroneous guess with regard to the existence of some elusive fact of the kind upon which venue provisions often turn. Indeed, this case is itself a typical example of the

problem sought to be avoided, for dismissal here would have resulted in plaintiff's losing a substantial part of its cause of action under the statute of limitations merely because it made a mistake in thinking that the respondent corporations could be "found" or that they "transact ... business" in the Eastern District of Pennsylvania.

" * * * The section is thus in accord with the general purpose which has prompted many of

the procedural changes of the past few years - that of removing whatever obstacles may impede an expeditious and orderly adjudication of cases and controversies on their merits. When a lawsuit is filed, that filing shows a desire on the part of the plaintiff to begin his case and thereby toll whatever statutes of limitation would otherwise apply. The filing itself shows the proper diligence on the part of the plaintiff which such statutes of limitation

were intended to insure. If by reason of the uncertainties of proper venue a mistake is made, Congress, by the enactment of § 1406(a), recognized that "the interest of justice" may require that the complaint not be dismissed but rather that it be transferred in order that the plaintiff not be penalized by what the late Judge Parker aptly characterized as "time-consuming and justice defeating technicalities." It would at least partially frustrate this enlightened congressional objective to

> import ambiguities into § 1406(a) which do not exist in the language Congress used to achieve the procedural reform it desired." (369 U.S., at 466-467) (Footnotes omitted.)

See, e.g., Corke v. Sameiet M.S. Song of Norway, 572 F. 2d 77 (2d Cir. 1978); United States v. Berkowitz, 328 F. 2d 358 (3d Cir. 1964), cert. denied, 379 U.S. 821 (1964); Smith v. Peters, 432 F. 2d 799 (6th Cir. 1973), cert. denied, 415 U.S. 989 (1974).

While this Court has not addressed the application of the jurisdictional transfer statute, subsection (c) of Section 1406, 28 U.S. Code, comparable concerns of avoiding technical difficul-

ties in reaching the merits of a claim, including statute of limitations concerns, have led the lower courts to liberally apply the "interests of justice" qualification of that statute. A leading case is that of the United States Court of Appeals for the Fifth Circuit, in Dr. John T. MacDonald Foundation v. Califano, 571 F. 2d 328 (5th Cir. 1978), cert. denied, 439 U.S. 893 (1978), where that Court of Appeals itself directed transfer to the Court of Claims, even though it doubted that the Court of Claims could provide the relief prayed for (571 F. 2d, at 332). In that case decisions of other Courts of Appeal, as well as the Court of Claims itself, holding that that court had jurisdiction of such subject matter cases, had been issued subsequent to

the plaintiff's initiation of its law suit.

Other comparable cases are Polos v. United States, 556 F. 2d 903 (8th Cir. 1977), transfer to Court of Claims with benefit of that court's jurisdictional amendments made after the plaintiff had initiated suit in the District Court, "plainly in the interest of justice" (556 F. 2d, at 906); and, Cook v. Arentzen, 582 F. 2d 870 (4th Cir. 1978), transfer to Court of Claims "in the interest of justice" as would avoid co-extensive district court jurisdiction and that court could give more complete relief (582 F. 2d, at 878).

The only cases that Counsel for Petitioners has been able to identify where transfer of a case otherwise within the subject matter jurisdiction of

the Court of Claims was denied, are those where the party requesting transfer has been dilatory in making the request. Peltzman v. Smith, 404 F. 2d 335, 336 (2d Cir. 1968) ("belatedly asserted"); United States v. Northern Colorado Water Con. Dist., 449 F. 2d 1, 4 (10th Cir. 1971) ("nine years later").

Indeed, prior to its instant decision the United States Court of Appeals for the Ninth Circuit found authority in Goldlawr, Inc. v. Heiman, supra, for considering the running of a statute of limitations as a factor supporting transfer to the Court of Claims in the interests of justice. Sherar v. Harless, 561 F. 2d 791, 794 (9th Cir. 1977) (transfer ordered).

A question has been raised in this case as to the applicable statute of

limitations, as the lower court's reference to petitioner's arguments concerning "the tolling of the statute of limitations," in the penultimate paragraph of its OPINION (infra, p. 19a) indicates. The petitioners have not been dilatory in requesting transfer, and it manifestly would be in the interest of justice to remove that and any other procedural obstacles to an orderly and expeditious adjudication of this case on its merits.

The Respondents have not argued that the new jurisdictional transfer statute, Section 1584(a) of Title 28, U.S. Code, is not otherwise applicable to this pending action. The objection seems to have been based on their suppositions as to what the transferee court's adjudication on the merits might be. That can-

not be a factor weighing against transfer, as such a construction would result in the very conflict of decisions and coextensive jurisdiction the statute seeks to prevent.

The lower court's denial of the transfer introduces conflict with the practice of liberal application of jurisdictional transfer statutes found in Courts of Appeals decisions sounded on principles enunciated by this Court in Goldlawr, Inc. v. Heiman, supra.

2. FINDING A BASIS OF JURISDICTION TO HEAR A TRADING WITH THE ENEMY ACT CLAIM FROM THE CHOICE OF MEANS OF EXERCISING THAT STATUTE'S AUTHORITY

IS CONTRARY TO THIS COURT'S CONSTRUCTION OF THE STATUTE

This Court has long construed the Trading With the Enemy Act in a manner that does not "make a fortress out of the dictionary," or result "in the emasculation or deletion of a provision which a less literal reading would preserve." Markham v. Cabell, 326 U.S. 404, 409 (1945).

The United States Court of Customs and Patent Appeals agreed that the "statute must be interpreted as a whole" (United States v. Yoshida International, Inc., 526 F. 2d 560, at 574 (1975)), and found the property assessments that are in issue here to be within the principle that the authority of the TWEA is operative only under the two express limitations that it be applied only (1)

in time of war or national emergency as declared by the President, and (2) to property in which any foreign country or national thereof has any interest (526 F. 2d, at 581). Indeed, the Court of Customs and Patent Appeals found it was significant that both "§ 5(b) and Proclamation 4074 deal only with foreign goods" (526 F. 2d, at 582) (emphasis quoted).

The Executive authority having been placed squarely within the borders of the TWEA, the "consistent Congressional policy" of recovery in the manner provided by that Act requires that its purposes be enforced. Guessefeldt v. McGrath, 342 U.S. 308, 315 (1952). As Section 7(c), 50 U.S.C. App. (1970), prescribes that the "sole relief and remedy" for any TWEA claim "shall be

that provided by the terms of" the Act, mere choice of language cannot read out of the Act what Congress put there. Duisberg v. United States, 89 F. Supp. 1019, 116 Ct. Cl. 361, cert. denied, 340 U.S. 890 (1950) (effort to utilize the Tucker Act to transfer jurisdiction to the Court of Claims, rejected.)

The lower court's decision[4/] conflicts with this Court's direction to construe the TWEA so as to fulfill its purposes in the manner Congress prescribed. This Court should hear this case to answer the serious question it leaves unanswered: once the Chief Executive is given authority to act by Congress, in an area otherwise reserved

4/ The lower court said it agreed with the conclusion in a similar case, though it did not otherwise follow the reasoning or discuss that other case. (Infra, p. 4a)

to the legislative branch, can the Executive's means of action revoke specific related mandates of Congress?

Conclusion

The lower court's denial of transfer is an application in frontal contradiction to the construction given a substantially identical transfer statute by other Courts of Appeal, and to principles established by this Court for achieving dispositions on the merits. This newest specialized court transfer statute should not be inaugurated with doubt and uncertainty, when directly applicable principles can immediately provide the uniformity and certitude desired in the system of courts created by Congress.

The need to have clearly understood the consequence of the exercise of

delegated authority by the Chief Executive continues today. Section 7(c), TWEA, a part of an Act of Congress, cannot be revoked by Executive discretion.

Respectfully submitted,

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Attorneys for Petitioners

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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CORNET STORES, et al., Plaintiffs/ Appellants,	)	NO. 78-3183
v.	)	OPINION
AZIE TAYLOR MORTON, Treasurer of the United States, et al., Defendants/ Appellees.	)	

Appeal From The United States District Court for the Central District of California

Before: SCHROEDER and FERGUSON, Circuit Judges, and MacBRIDE,* District Judge.

MacBRIDE, District Judge,

Between August 16, 1971 and December 20, 1971, pursuant to Presidential

* Honorable Thomas J. MacBride, United States District Judge for the Eastern District of California, sitting by designation.

Proclamation No. 4074, plaintiffs were required to pay an additional 10 percent ad valorem duty on the dutiable merchandise they imported into the United States. The validity of that Proclamation was tested in United States v. Yoshida International, Inc., 526 F.2d 560 (C.C.P.A. 1975), and Alcan Sales v. United States, 534 F.2d 920 (C.C.P.A.), cert denied, 429 U.S. 986 (1976). The Court of Customs and Patent Appeals upheld the imposition of this import duty surcharge as an exercise of the power delegated to the President by section 5(b) of the Trading with the Enemy Act, 50 U.S.C. App. § 5(b).[1/] In the wake of Yoshida and Alcan, plaintiffs sued in

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1/ During 1971 when Presidential Proclamation No. 4074 was in effect and for some years thereafter, section 5(b) provided in part:
(Continued)

the district court for recovery of the import surcharges they had paid, relying primarily on the jurisdictional pro-

1/ (Continued)

> (1) During the time of war or during any other period of time of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise--
>
> ...
>
> (B) investigate, regulate, ... prevent or prohibit, any ... importation or exportation of ... any property in which any foreign country or a national thereof has any interest,
>
> by any person, or with respect to any property, subject to the jurisdiction of the United States ....

Section 5(b) was amended in 1977, Act of Dec. 28, 1977, Pub.L. No. 95-223, tit. I, §§101(a), 102, 103(b), 91 Stat. 1625, 1626, but the amendment is not pertinent to the issues presented in this litigation.

visions of section 9 of that Act. The district court held that the matter was within the exclusive jurisdiction of the Customs Court. Plaintiffs appeal; we affirm. This court finds itself in accord with the conclusion reached by the only other court to address the precise issue presented. Henry Pollack, Inc., v. Blumenthal, 444 F. Supp. 56 (D.D.C. 1977), aff'd mem., 593 F.2d 1371 (D.C. Cir.), cert denied, 100 S. Ct. 70 (1979).

Originally enacted as a war measure during the First World War, Act of Oct. 6, 1917, ch. 106, 40 Stat. 415, section 5(b) of the Act was amended during the Depression to accord comprehensive power in connection with foreign trade and commerce to the President during peacetime emergencies. Act of Mar. 9, 1933,

ch. 1, § 2, 48 Stat. 1. The authority granted in the 1933 amendment to section 5(b) was not limited in scope to circumstances involving enemies or allies of enemies. Instead, the powers granted in amended section 5(b) were intended to be exercised in peacetime to enable the President to engage in extensive regulation of international economic transactions when a national emergency so required. In fact, whatever Congress may have contemplated in 1933, section 5(b) became the foundation for far-ranging and long-term executive regulatory activity between 1933 and the late 1970s. The national banking emergency declared by President Roosevelt in 1933, Executive Order No. 6260, reprinting following 12 U.S.C. § 95a, and a number of subsequently declared national emer-

gencies were terminated only by operation of the National Emergencies Act of 1976, 50 U.S.C. § 1601 et seq. As a result of the continuing state of national emergency, the powers granted in section 5(b) remained available to the President for more than 40 years without interruption.

Although section 5(b) was significantly amended in 1933, other sections of the Trading with the Enemy Act were not concurrently amended and, for that reason, retain original limitations. In particular, the claims procedures and judicial review accorded under section 9 of the Act to persons who are not enemies or allies of enemies have no application to those purely peacetime powers created when section 5(b) was amended. Section 9(a) sets forth an

administrative scheme through which eligible persons may seek recovery of property seized under the Act; if relief is initially denied, the claimant is accorded the right to sue in district court. The section 9(a) remedy is available for persons

> claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States ...

50 U.S.C. App. § 9(a).

Although the language of section 9(a) could, with some difficulty, be construed to grant jurisdiction to the district courts to hear actions for recovery of import and export duties im-

posed pursuant to the peacetime powers of section 5(a)[2/] such a construction would violate the congressionally designated allocation of judicial responsibility over customs matters. Pursuant to 28 U.S.C. § 1582, the Customs Court is granted exclusive jurisdiction over customs matters. The clear congressional intent to place such jurisdiction solely in the Customs Court is reinforced by

---

2/ Two obvious impediments to an attempt to construe section 9(a) as a grant of peacetime jurisdiction in a case such as is before this court appear in the grant of jurisdiction to "/a/ny person not an enemy or ally of enemy" and in the type of property at issue, namely, property in the hands of the Alien Property Custodian. Neither of these references in the language of the section can be readily deemed applicable to circumstances in which the plaintiffs are importers of dutiable merchandise who were required to pay an import surcharge. See generally, Henry Pollack, Inc., v. Blumenthal, supra.

28 U.S.C. § 1340 which expressly denies to the district court jurisdiction over "matters within the jurisdiction of the Customs Court." Jerlian Watch Co. v. United States Department of Commerce, 597 F.2d 687, 690 (9th Cir. 1979).

Published opinions reveal a number of instances in which creative arguments have been presented in hope of avoiding the exclusivity of Customs Court jurisdiction. E.g., id.; Fritz v. United States, 535 F.2d 1192 (9th Cir. 1976); J.C. Penney Co. v. United States Treasury Department, 439 F.2d 63 (2d Cir.), cert. denied, 404 U.S. 869 (1971); Riccomini v. United States, 69 F.2d 480 (9th Cir. 1934). These arguments have been rejected with exceptions only for unusual circumstances as, for example, when activities outside the United

States created a situation in which the events triggering Customs Court jurisdiction under section 1582 would not occur. E.g., Sneaker Circus, Inc. v. Carter, 566 F.2d 396 (2d Cir. 1977); Timken Co. v. Simon, 539 F.2d 211 (D.C. Cir. 1976); Consumers Union of the U.S., Inc. v. Kissinger, 506 F.2d 136 (D.C. Cir.), cert. denied, 421 U.S. 1004 (1974). The rule repeatedly applied in the Ninth Circuit is that "/c/onflicts between the broad grants of jurisdiction to the district courts and the grant of exclusive jurisdiction of the Customs Court are to be resolved by upholding the exclusivity of the Customs Court jurisdiction." Fritz v. United States, supra at 1194.

The recent decision in Jerlian Watch Co. v. United States Department of

Commerce, supra, is most directly applicable to the arguments raised by plaintiffs herein. In Jerlian, plaintiff-watch manufacturers sought to challenge the validity of allocation rules governing the entry of duty-free watches from the insular possessions of the United States. They urged that jurisdiction might properly lie in the district courts because the challenged rules and the statute under which they were promulgated primarily served "a traditionally noncustoms purpose, promoting economic stimulation in the insular possessions," and because the absence of an adequate remedy, namely, the injunctive and declaratory relief, in the Customs Court necessitated recognition of district court jurisdiction. This court flatly rejected those arguments.

Although Jerlian acknowledged that exclusive jurisdiction will not lie in the Customs Court when "the purposes of the challenged statutes /are/ other than customs purposes, and the statutes /are/ found not to be a part of the customs laws," the court held that the allocation rules had a substantial relation to traditional customs purposes, namely, "protection of domestic industry from foreign competition and the raising of revenues." Id. at 691. Under these circumstances, congressional intent mandated that the action be brought in the Customs Court:

> In enacting 28 U.S.C. § 1582, Congress intended that matters involving customs laws should be heard by one tribunal so that uniformity of decision would result. If the district court should

> have jurisdiction over this type of action, inconsistent district and circuit court opinions on both jurisdictional and substantive revenue and protection claims would result. Moreover the Customs Court would be denied jurisdiction in the greatest area of its expertise. We do not believe that Congress intended these results.

Id. (citations omitted). This policy of uniform administration of customs laws also defeated the plaintiffs' contention that financial impossibility precluded obtaining an adequate remedy in the Customs Court. As the Jerlian court noted, an "adequate remedy" exception to the exclusive jurisdiction of the Customs Court does exist in instances of factual impossibility, but the court declined to expand the exception to include financial impossibility. Although

injunctive and declaratory relief might be more desirable remedies, "'the mere fact that more desirable remedies are unavailable does not mean that existing remedies are inadequate.'" Id. at 692, quoting J.C. Penney Co. v. United States Treasury Department, supra at 68.

Jerlian controls the resolution of this appeal. There, as here, plaintiffs sought to define too narrowly the scope of the customs matters within the exclusive jurisdiction of the Customs Court and to label legally inadequate a Customs Court remedy that is merely undesirable or inconvenient.

The preamble to Proclamation 4074 sets forth as grounds for the surcharge the declarations that

> there has been a prolonged decline in the international monetary

> reserves of the United States, and our trade and international competitive position is seriously threatened and, as a result, our continued ability to assure our security could be impaired; /and/ the balance of payments position of the United States requires the imposition of a surcharge on dutiable imports ....

As the Court of Customs and Patent Appeals concluded in United States v. Yoshida International, Inc., supra, the principal purpose of the surcharge was the regulation of imports.

> What was sought was an offset to actions of our foreign trading partners which had led to loss of our favorable balance of trade and to a serious negative balance .... Pressure exerted by the surcharge contributed to achievement of a multilateral agreement of major nations, which included a realignment of

currency exchange rates.

Id. at 579 (footnote omitted). Appellants contend that the duty imposed by Proclamation 4074 differs significantly from traditional customs duties whose purposes are, in appellants' view, to raise revenue or to protect American industry. Viewed liberally, of course, Proclamation 4074 was significantly founded on the need to protect American industry as a whole from the unsatisfactory trade and international competitive position created by the decline in international monetary reserves. The Proclamation clearly furthered multiple purposes, with national security and customs purposes standing out as the most prominent. Customs Court jurisdiction is not defeated because a statute or regulation serves other ends

in addition to recognized customs purposes, so long as there exists "a substantial relation to traditional customs purposes." Jerlian Watch Co. v. United States Department of Commerce, supra at 691. Proclamation 4074 was intended to be a customs regulation at the time of its promulgation, as evidenced by its references to the Tariff Act of 1930 and the Trade Expansion Act of 1962, and its directives were fulfilled through the existing scheme for the collection of customs duties.[3/] As in Jerlian, the presence of a substantial relation to

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3/ Customs duties have historically been imposed in furtherance of a wide variety of economic and other purposes. For example, 19 U.S.C. § 128, enacted in 1913, imposes a discriminating 10 percent ad valorem surcharge on all goods imported into the United States on the flag vessels of other nations unless a

(Continued)

the traditional customs purposes mandates that juriscition rest in the Customs Court pursuant to 28 U.S.C. § 1582.

3/ (Continued)

treaty permits entry not subject to the duty, unless the vessel is owned by United States citizens and is re-registered under the United States flag before leaving port, or unless the goods are imported from a country contiguous to the United States in the usual course of strictly retail trade. The exception granted to goods transported in a flag vessel of a foreign nation which is owned by United States citizens and re-registered in this country serves no traditional customs purposes cited by plaintiffs. It did, however, encourage an increase in the United States merchant fleet in the worsening international climate prior to World War I. See also 19 U.S.C. § 1338 (authorizing imposition of additional duties on articles imported from countries found by the President to have placed a burden or disadvantage upon the commerce of the United States); 19 U.S.C. § 2561 et seq. (authorizing the President to provide duty-free treatment for eligible articles from certain developing nations in furtherance of their economic development).

Plaintiffs seek to avoid exclusive Customs Court jurisdiction by arguing that the Customs Court cannot provide equitable remedies such as injunctive and declaratory relief and cannot afford litigants the benefit of such equitable doctrines as the tolling of the statute of limitations. The fact that Congress has not chosen to empower the Customs Court to grant the full measure of equitable relief available in the district courts is not a basis for abrogating the exclusivity of Customs Court jurisdiction. Jerlian Watch Co. v. United States Department of Commerce, supra at 692. Recognition of an exception based on the inconvenience or undesirability of litigation in a court lacking full equitable powers would defeat congressional intent to ensure

uniform administration and application of the customs laws embodied in 28 U.S.C. § 1582 and other statutes allocating jurisdiction between the district courts and the Customs Court. Accordingly, we reject plaintiffs' argument that the Customs Court cannot provide a legally adequate remedy.

The decision of the district court is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CORNET STORES, et al., Plaintiffs/ Appellants,	)	No. 78-3183
v.	)	
AZIE TAYLOR MORTON, Treasurer of the United States, et al., Defendants/ Appellees.	)	ORDER

The order filed on December 3, 1980 is corrected to read:

The appellants' motion to alter judgment to include a direction that the district court transfer this cause to the United States Court of International Trade is denied.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CORNET STORES, ET AL.,	)	No. 78-3183
	)	
Plaintiffs/ Appellants,	)	MOTION TO ALTER JUDGMENT AND
v.	)	TRANSFER TO THE UNITED
AZIE TAYLOR MORTON, TREASURER OF THE UNITED STATES, ET AL.,	)	STATES COURT OF INTERNATIONAL TRADE
	)	
Defendants/ Appellees.	)	(28 U.S.C. § 1584, as amended by Pub.L. 96-417)

Appellants herein move this Court to alter its judgment, entered herein on November 6, 1980, to include an Order directing the District Court to transfer the said civil action to the Court of International Trade, in accordance with

28 U.S. Code, Section 1584, as amended by Pub. L. 96-417, October 10, 1980. This Court having found and adjudged that the United States Customs Court has exclusive jurisdiction of the subject matter of this civil action, Section 1584 as amended and effective as to this action provides for transfer to that Court, now known as the United States Court of International Trade (Customs Courts Act of 1980, Sections 101, 102, 702, Pub. L. 96-417).

Section 1584(a), Title 28, U.S. Code, as amended, reads as follows:

> "§ 1584. Cure of defects
>
> "(a) If a civil action within the exclusive jurisdiction of the Court of International Trade is commenced in a district court of the United States, the district court shall, in the

> interest of justice, transfer such civil action to the Court of International Trade, where such action shall proceed as if it had been commenced in the Court of International Trade in the first instance.

This amendment of Section 1584 was contained in Section 201 of the Customs Court Act of 1980. While certain portions of Section 201 of that 1980 legislation are not effective for pending actions, Section 701(a) of that Customs Courts Act of 1980 provides that the amendments as they pertain to Section 1584 were effective on November 1, 1980.

The legislative history illustrates that the amendments to Section 1584 were understood and intended by Congress to be applicable to actions pending on its effective date, in this instance,

November 1, 1980. Pub. L. 96-417 was the result of the passage by the two Houses of Congress of two nearly identical statutes. The Senate's version was as contained in S. 1654 (96th Cong., 2d Sess. 1980). The House of Representatives' bill was contained in H.R. 7540. When both Houses passed their individual bills, the version as finally agreed upon in conference is as found in Pub. L. 96-417. The legislative history is found in H. Rep. 96-1235 (96th Cong., 2d Sess. 1980). That House Report also contains the text of H.R. 7540. Section 201 of H.R. 7540 was identical to Section 201 of S. 1654 as enacted. The referenced available legislative history, H. Rep. 96-1235, at 42 (96th Cong., 2d Sess. 1980) reads as follows:

The Committee also amended the effective date provision of H.R. 6394. As introduced, section 701 provided that the Customs Courts Act of 1980 would be effective retroactively to January 1, 1980.

After concerns were raised about the retroactive effective date, the Subcommittee requested all of its witnessess to review a phased effective date proposal submitted by the Department of Justice. 41/ There was general agreement that a three-tiered effective date approach adequately allayed all concerns: those provisions

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41. Letter from David M. Cohen, Director, Commercial Litigation Branch, Civil Division, Department of Justice, to Leo M. Gordon, Counsel, Subcommittee on Monopolies and Commercial Law, Committee on the Judiciary, "Customs Courts Act of 1980," Hearings, at 85-87.

> which restated current law to be effective on the date of enactment; those provisions which created new jurisdiction for the Court of International Trade to be effective for all civil actions commenced after the date of enactment; and those provisions relating to civil penalty and collection actions commenced by the United States to be effective as to civil actions commenced after the 90th day after the date of enactment.
>
> Accordingly the Subcommittee adopted an amendment reflecting the Department of Justice's recommendation.

The same House Report, at 50, describes Section 1584, Subsection (a), amendments as follows:

> Proposed section 1584 is a procedural provision which will allow courts to correct defects in jurisdiction.

> Subsection (a) permits the transfer of cases from a district court to the Court of International Trade when the district court determines that the action should have been commenced in the Court of International Trade in the first instance.

That the amendment to Section 1584 was consequently understood and meant to apply to actions pending on the date of enactment, was finally made precisely clear in the same Report, at 70:

> Section 701 contains the various effective date provisions.
>
> Section 701(a) provides that the amendments made by the Customs Court Act of 1980 shall take effect on the date of enactment of this bill and shall apply to civil actions pending on or commenced on or after the date of enactment. The amendments covered by this subsection restate the existing jurisdiction and powers of the court

> that are retained by this bill. The effect of subsection (a) is to permit the court to exercise its jurisdiction and powers under existing law, including its new authority under the Trade Agreements Act of 1979. In this way, the Committee ensures that no litigant is deprived of the opportunity to have his case heard on the merits and to obtain the appropriate judicial remedy. (Emphasis added.)

The transfer of this action will accomplish the purpose of the new Section 1584. Consequently, in accordance with the opinion of this Court of November 6, 1980, it would demonstratively be in the interest of justice to direct the lower Court to transfer the cause to the United States Court of International Trade. Sierra-Vista Hospital, Inc., et al. v. Califano, 597

F. 2d (9th Cir. 1979).

Respectfully submitted,

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By: _____
Robert Glenn White

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CORNET STORES, et al., Plaintiffs/ Appellants,	)	
vs.	)	No. 78-3183
AZIE TAYLOR MORTON, Treasurer of the United States, et al., Defendants/ Appellees.	)	

APPELLEES' OPPOSITION TO APPELLANTS' MOTION TO ALTER JUDGMENT AND TRANSFER TO THE UNITED STATES COURT OF INTERNATIONAL TRADE

On November 14, 1980 -- eight days after this Court issued its opinion in these consolidated appeals and the Clerk entered judgment -- the appellants moved to alter the judgment and to transfer these cases to the United States Court of International Trade.

We oppose appellants' motion.

Appellants contend that as a result of the recent enactment by Congress of the Customs Courts Act of 1980, Pub. L. 96-417, October 10, 1980, this Court should not just affirm the dismissal below, but direct the district court to transfer this action to the Court of International Trade. Appellants reason that since both, this Court and the court below, held that the United States Customs Court -- and by necessary implication its successor-court, the Court of International Trade -- has exclusive jurisdiction of the subject matter of these refunds suits, a transfer rather than an outright dismissal is in order.

Appellant's contention is devoid of substance. Section 1584 of Title 28, United States Code, as amended by the

Customs Courts Act of 1980, provides for a transfer of a case from the district courts to the Court of International Trade only if the transfer would be in the "interest of justice." No such justification has been shown here. On the contrary, it is manifest that a transfer of these cases is sought solely for the purposes of delay. The gravamen of appellants' claims was and remains that the duty surcharges imposed by Presidential Proclamation No. 4074 in 1971 was invalid and that appellants had a right to recover the surcharges. But as this Court acknowledged in its opinion of November 6 in this cause, the Court of Customs and Patent Appeals has on two occasions ruled on the merits that the surcharge was validly assessed (slip op. p. 1). One is left to guess

how the interests of justice would be advanced if these cases were now transferred to the Court of International Trade where they would be summarily dismissed on the merits.

We urge that appellants' motion be denied.

Respectfully submitted,

ALICE DANIEL,
Assistant Attorney General,

ANDREA SHERIDAN ORDIN,
United States Attorney,

BRUNO A. RISTAU,
Attorney,
Department of Justice,
Washington, D.C. 20530.

Customs Courts Act of 1980,
Section 701 (94 Stat. 1747):

"SEC. 701(a) Except as provided in subsection (b) of this section, the provisions of and amendments made by this Act shall take effect on November 1, 1980.

"(b)(1) The following sections of title 28, United States Code, shall apply with respect to civil actions commenced on or after the 90th day after the effective date of this Act:

(A) Sections 1582, 2639(a)(2), and 2640(a)(6), as amended by sections 201 and 301 of this Act.

(B) Sections 1352, 1355, and 1356, as amended by sections 506, 507, and 508 of this Act.

(2) Section 592(e) of the Tariff Act of 1930, as amended by section 609

of this Act, shall apply with respect to civil actions commenced on or after 90th day after the effective date of this Act."

Section 9(a), Trading With the Enemy Act (50 U.S.C. App (1970)):

Section 9(a)

"(a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under

oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: PROVIDED, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the

filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the United States District Court for the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer assignment, or delivery to said claimant of the money or other property so held by

the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. * * * "

Section 33, Trading With the Enemy Act, 50 U.S.C. App (1970):

Section 33

"No return may be made pursuant to section 9 or 32 /section 9 or 32 of this Appendix/ unless notice of claim has been filed: (a) in the case of any property or interest acquired by the United States prior to December 18, 1941, by August 9, 1948; or (b) in the case of any property or interest acquired by the United States on or after December 18, 1941, not later than one year from February 9, 1954, or two years from the vesting of the property or interest in respect of which the claim is made, whichever is later. No suit pursuant to section 9 /section 9 of this Appendix/ may be instituted after April 30, 1949, or after the expiration of two years

from the date of the seizure by or vesting in the Alien Property Custodian, as the case may be, of the property or interest in respect of which relief is sought, whichever is later, but in computing such two years there shall be excluded any period during which there was pending a suit or claim for return pursuant to section 9 or 32(a) hereof /section 9 or 32(a) of this Appendix/."

H.R. Rep. No. 1235, 96th Cong., 2d Sess., reprinted in [1980] U.S. CODE CONG. & AD. NEWS 7088, excerpts therefrom, as noted:

at 7112-13:

"The Committee also amended the effective date provision of H.R. 6394. As introduced, section 701 provided that the Customs Courts Act of 1980 would be effective retroactively to January 1, 1980.

"After concerns were raised about the retroactive effective date, the Subcommittee requested all of its witnesses to review a phased effective date proposal submitted by the Department of Justice.[41] There was general agreement

"41. Letter from David M. Cohen, Director, Commercial Litigation Branch, Civil Division, Department of Justice, to Leo M. Gordon, Counsel, Subcommittee on Monopolies and Commercial Law, Committee on the Judiciary, "Customs Courts Act of 1980," Hearings, at 85-87."

that a three-tiered effective date approach adequately allayed all concerns: those provisions which restated current law to be effective on the date of enactment; those provisions which created new jurisdiction for the Court of International Trade to be effective for all civil actions commenced after the date of enactment; and those provisions relating to civil penalty and collection actions commenced by the United States to be effective as to civil actions commenced after the 90th day after the date of enactment.

"Accordingly, the Subcommittee adopted an amendment reflecting the Department of Justice's recommendation.

at 7120:

"Section 1584

"Proposed section 1584 is a procedural provision which will allow courts to correct defects in jurisdiction.

"Subsection (a) permits the transfer of cases from a district court to the Court of International Trade when the district court determines that the action should have been commenced in the Court of International Trade in the first instance."

at 7141:

"TITLE VII-EFFECTIVE DATES AND MISCELLANEOUS PROVISIONS

"Section 701

"Section 701 contains the various effective date provisions.

"Section 701(a) provides that the amendments made by the Customs Court

Act of 1980 shall take effect on the date of enactment of this bill and shall apply to civil actions pending on or commenced on or after the date of enactment. The amendments covered by this subsection restate the existing jurisdiction and powers of the court that are retained by this bill. The effect of subsection (a) is to permit the court to exercise its jurisdiction and powers under existing law, including its new authority under the Trade Agreements Act of 1979. In this way, the Committee ensures that no litigant is deprived of the opportunity to have his case heard on the merits and to obtain the appropriate judicial remedy." (Emphasis added.)

November 5, 1980

Clerk, United States Court of
Appeals for the Ninth Circuit
7th and Mission Streets
P.O. Box 547
San Francisco, California 94101

RE: Cornet Stores, et al. v. Morton et al., Civil Appeal No. 78-3183

Dear Sir:

It seems appropriate that as the attorney for the appellant in the above-referenced case, that I draw to your attention, for possible reference to the Court itself, certain recent legislation. The legislation in question is identified as Public Law 96-417, enacted October 10, 1980. That legislation, cited also as the "Customs Courts Act of 1980," dealt in substantial part with the jurisdiction of the Customs Court. Section 101 of that legislation changed the

name of the Customs Court to the United States Court of International Trade.

Section 201 of the legislation I refer to, changed the jurisdiction of the Customs Court, now Court of International Trade, in substantial ways. By amending Sections 1581 through 1585 of Title 28, United States Code, the Court of International Trade now has the same powers in law and equity of, or as conferred by statute upon, a District Court of the United States. More detailed delineation of the jurisdiction of the Court of International Trade is in the revised Section 1581, of Title 28, United States Code.

It is my view as counsel for appellant herein that this legislation does not otherwise change the arguments as

thus far addressed on appeal. It does, again, seem appropriate to ask if this new legislation should not be brought to the attention of the Court.

Sincerely yours,
GLAD & WHITE

Robert Glenn White
for Glad, Tuttle & White

RGW/mcb

cc: Bruno A. Ristau, Esq.

Customs Courts Act of 1980, Pub. L. 96-417, Section 201 (94 Stat. 1729) (pertinent portion thereof):

"Section 1581. Civil actions against the United States and agencies and officers thereof

" * * *

"(i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section * * * the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for -

"(1) revenue from imports or tonnage;

"(2) tariffs, duties, fees or other taxes on the importation of merchandise for reasons

other than the raising of revenue;

"(3) embargoes or other quantitative restrictions

* * *

"(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

" * * * * "

80-1295

Office-Supreme Court, U.
FILED
FEB 11 1981
ALEXANDER L. STEVAS,
CLERK

No. .....

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

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CORNET STORES, ET AL.,

PETITIONERS,

V.

AZIE TAYLOR MORTON, ET AL.,

RESPONDENTS.

SUPPLEMENT TO APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Attorney for Petitioners

No. .....

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

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CORNET STORES, ET AL.[1/],

PETITIONERS,

V.

AZIE TAYLOR MORTON, ET AL.,

RESPONDENTS.

SUPPLEMENT TO APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

1/ Rule 28.1 Corporate Relationships of parties provided in body of Petition for Writ of Certiorari, filed by mail on January 30, 1981.

FILED
AUG 18 1978

CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY_____DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CORNET STORES, et al., Plaintiffs,	No.CV 77-4593-FW
v.	MEMORANDUM OF DECISION
AZIE TAYLOR MORTON, Treasurer of the United States, et al., Defendants.	

Plaintiffs in this action sue for the return of funds collected from them by Defendants acting pursuant to Presidential Proclamation No. 4074. Defendants have moved the Court to dismiss the complaint on the ground the Court

lacks jurisdiction of the subject matter.

As stated in United States v. Yoshida Int'l, Inc., 526 F.2d 560, 567 (CCPA 1976), the United States in the summer of 1971 faced an economic crisis brought about by a severe balance of payments deficit. In response to the crisis, the President issued Proclamation 4074 which declared a national emergency and imposed a surcharge in the form of a supplemental duty amounting to 10 per cent ad valorem on all dutiable articles imported into the United States. Less than five months later, on December 20, 1971, the President terminated the surcharge program by Presidential Proclamation No. 4098. While it was in effect, the responsibility for administering Proclamation 4074 was given to the Secretary of the Treasury and the Bureau

of Customs.

After paying the surcharges, many importers filed administrative protests, 19 U.S.C. §1514, challenging the President's authority to impose the surcharge program. In United States v. Yoshida Int'l, Inc., supra, the Court of Customs and Patent Appeals determined Congress had delegated to the President, under the provisions of the Trading With the Enemy Act /hereinafter the Act/, 50 U.S.C. App. §§1 et seq., authority to impose surcharges on imported dutiable goods. Accord, Alcan Sales v. United States, 534 F.2d 920 (CCPA), cert. denied, 429 U.S. 986 (1976).

Plaintiffs contend funds collected under the Trading With the Enemy Act cannot be withheld from one possessing an interest in them who is neither an

enemy nor an ally of an enemy of the United States. Under the provisions of §9(a) of the Trading With the Enemy Act, 50 U.S.C. App. §9(a), a claimant may institute a suit in equity in the District Court to establish any right claimed in money conveyed to the Alien Property Custodian and held in the Treasury of the United States.

Plaintiffs contend that this Court has jurisdiction over the subject matter of their claim. Such contention is without merit. Claims arising from the surcharge program lie within the exclusive jurisdiction of the Customs Court. Henry Pollak, Inc. v. Blumenthal, 444 Fed.Supp. 56, 59 (D.D.C. 1977).

The Trading With the Enemy Act was originally enacted in 1917 to prohibit trade with wartime enemies. It author-

ized the President to seize enemy owned property, administer it for the benefit of the United States, and dispose of it as Congress might direct. During the economic crisis of the 1930's, Congress selected §5(b) of the Act, 50 U.S.C. App. 5(b) as the foundation upon which to fashion a broad delegation of peacetime regulatory power over the economy to the President. In 1941 §5(b) of the Act was amended to permit flexible control of transactions in foreign property by the President. 1941 U.S. Code Cong. Serv. at 1031. Among other things, the amendment allowed him to 'regulate' the 'importation' of 'any property' in which 'any foreign country' had 'any interest'. Id at 940./ By these amendments Congress transformed a wartime measure into a customs law which could be used to regulate importa-

tion by imposing an import duty surcharge. See United States v. Yoshida Int'l, supra, 526 F.2d at 573, 576.

Congress has provided that jurisdiction over claims arising from the customs laws rests exclusively with the Customs Court. 28 U.S.C. §1582(a). As stated in J.C. Penney Company v. United States Treasury Dept., 439 F.2d 63, 65 (2d Cir. 1971), "the Customs Court shall have 'exclusive jurisdiction' of all civil actions challenging an administrative decision, 'including the legality of all orders and findings entering into the same,' when that decision involves, inter alia the . . . rate and amount of duties chargeable, all charges or extensions within the jurisdiction of the Secretary of the Treasury . . . under any provision of the custom laws."

Whether the import duty surcharge was properly imposed or should be returned to the importers from whom it was collected raises an issue of substantive customs law. For this Court to assume jurisdiction of the present action, therefore, would erode the Congressional design for a "complete system of corrective justice with respect to matters arising under the customs laws." Cottman Co. v. Dailey, 94 F.2d 85, 88 (4th Cir. 1938).

Thus, §9 confers no jurisdiction upon this Court as to matters herein involved. "Congress clearly intended §1582(a) to prevail over any broadly-worded statutes which . . . might appear to grant concurrent jursidiction over customs matters to the district courts." Fritz v. United States, 535

F.2d 1192, 1194 (9th Cir. 1976). By the same reasoning, Plaintiffs may not rely on 28 U.S.C. §§1331, 1337, 1361, 1391(e) as alleged in the complaint.

Thus it appears the motion of Defendants to dismiss should be granted. The Court will render judgment dismissing the action, but no judgment shall be entered until the Court has signed its formal judgment.

DATED this 18 day of August, 1978.

FRANCIS C. WHELAN
UNITED STATES DISTRICT JUDGE

No. 80-1295

APR 7 1980
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

CORNET STORES, ET AL., PETITIONERS

v.

ANGELA MARIE BUCHANAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court had subject matter jurisdiction over this action to challenge the collection of supplemental import duties.

2. Whether the court of appeals erred in affirming the district court's dismissal of petitioners' claims rather than ordering the transfer of those claims to the Court of International Trade.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 632 F. 2d 96. The opinion of the district court (Pet. App. 53a-60a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 6, 1980. A motion to alter judgment was denied on December 3, 1980 (Pet. App. 21a). The petition for a writ of certiorari was filed on February 2, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On August 15, 1971, a 10% ad valorem supplemental duty was imposed by Presidential Proclamation No. 4074, 3 C.F.R. 60 (1971-1975 Compilation), *and in* 85 Stat. 926, upon all dutiable merchandise imported into the United

States. Between August 16, 1971, and December 20, 1971,[1] petitioners paid this supplemental duty upon various goods that they imported (Pet. App. 1a-2a). The record does not show which of the petitioners, if any, complied with the requirements of Section 514 of the Tariff Act of 1930, 19 U.S.C. 1514, by filing protests as to the collection of this supplemental duty. Nor does the record show the disposition of any protests that petitioners may have filed. Protests were filed, however, by other importers; the protests were denied, and the importers brought lawsuits in the Customs Court to challenge the validity of Proclamation No. 4074 (Pet. App. 55a). In *United States* v. *Yoshida International, Inc.*, 526 F. 2d 560 (C.C.P.A. 1975), and *Alcan Sales* v. *United States*, 534 F. 2d 920 (C.C.P.A.), cert. denied, 429 U.S. 986 (1976), the Court of Customs and Patent Appeals upheld the validity of the supplemental duties, finding that the President had authority to impose surcharges upon imported dutiable goods under Section 5(b) of the Trading With the Enemy Act, 50 U.S.C. app. 5(b).

After the decisions in *Yoshida* and *Alcan*, petitioners filed 18 lawsuits in the United States District Court for the Central District of California, seeking return of the supplemental duties on the theory that Proclamation No. 4074 exceeded the authority granted to the President by the Trading With the Enemy Act (Pet. 13; Pet. App. 2a-3a, 55a-56a). The government moved to dismiss these suits on the ground that the subject matter was within the exclusive jurisdiction of the Customs Court. Petitioners' actions were consolidated for decision of the jurisdictional issue (Pet. 14). On August 18, 1978, the district court granted the government's motion to dismiss, holding that the question "[w]hether the import duty surcharge was properly imposed

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[1]The surcharge imposed by Proclamation No. 4074 was terminated by Presidential Proclamation No. 4098, 3 C.F.R. 94 (1971-1974 Compilation) *and in* 86 Stat. 1591, on December 20, 1971.

or should be returned to the importers from whom it was collected raises an issue of substantive customs law" within the exclusive jurisdiction of the Customs Court (Pet. App. 59a).

The sole issue that petitioners presented on appeal was whether the district court had jurisdiction over their claims.[2] During the pendency of petitioners' appeal, the Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727, became law, revising the statutes governing the status, jurisdiction and powers of the Customs Court (which was renamed the United States Court of International Trade). On November 5, 1980, one day before the court of appeals issued its decision in this case, petitioners' counsel informed the court of the Customs Courts Act, but stated that the Act did not affect the arguments "as thus far addressed on appeal" (Pet. App. 48a-49a). The opinion that the court of appeals thereafter entered, affirming the dismissal of petitioners' claims, made no reference to the Customs Courts Act, but relied only upon the former jurisdictional statutes and the cases construing them. Based on those authorities, the court concluded that "the presence of a substantial relation to the traditional customs purposes mandates that jurisdiction [over claims involving Proclamation No. 4074] rest in the Customs Court" (Pet. App. 17a-18a).

Eight days after the court of appeals issued its opinion, petitioners moved to alter the judgment, asking for the first time that their claims be transferred to the proper forum rather than dismissed (Pet. App. 22a-30a). In support of their motion, petitioners pointed out that 28 U.S.C. 1584(a) (added by Section 201 of the Customs Courts Act of 1980, 94 Stat. 1729)) permits a district court to order the transfer of a

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[2]In arguing that the district court had jurisdiction, petitioners relied primarily (Pet. App. 3a-4a) on Section 9 of the Trading With the Enemy Act, 50 U.S.C. app. 9.

case within the exclusive jurisdiction of the Court of International Trade but mistakenly filed in the district court. On December 3, 1980, the court of appeals denied petitioners' motion without opinion (Pet. App. 21a).

ARGUMENT

1. The decision of the court of appeals holding that 28 U.S.C. 1582 vested the Customs Court with exclusive jurisdiction over petitioners' claims is correct and accords with all relevant authorities. Further review is therefore unwarranted.

First, the decision below is consistent with that of the only other court that has directly addressed the question of the proper forum for challenging supplemental duties collected under Proclamation No. 4074. See *Henry Pollak, Inc.* v. *Blumenthal*, 444 F. Supp. 56 (D.D.C. 1977), aff'd mem., 593 F. 2d 1371 (D.C. Cir.), cert. denied, 444 U.S. 836 (1979). Second, the decision below is consistent with the decisions of the Court of Customs and Patent Appeals in *United States* v. *Yoshida International, Inc.*, *supra*, and *Alcan Sales* v. *United States*, *supra*, in which the court considered the merits of certain importers' challenges to the validity of Proclamation No. 4074. See page 2, *supra*. Finally, the decision of the court of appeals is consistent with the understanding of Congress (as expressed in Section 611 of the Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 2075) that surcharges imposed under Proclamation No. 4074 were "protestable" duties within the exclusive jurisdiction of the Customs Court pursuant to 28 U.S.C. 1582(a). The legislative history of Section 611 shows that Congress was aware both that the Customs Court had found Proclamation No. 4074 invalid in *Yoshida* and that the United States had appealed that decision to the Court of Customs and Patent Appeals. See S. Rep. No. 93-1298, 93d Cong., 2d Sess. 235 (1974). Congress desired to hold in abeyance (pending the appellate decision in *Yoshida*) resolution of

the various challenges that had been made with respect to the collection of supplemental duties under Proclamation No. 4074. *Ibid.* Accordingly, Congress in Section 611 extended the time for administrative review of protests to five years from the date that the protest was filed "in the case of any protest * * * involving the imposition of an import surcharge in the form of a supplemental duty pursuant to Presidential Proclamation 4074."[3] Pursuant to 28 U.S.C. 1582(a), the Customs Court had exclusive jurisdiction of "civil actions instituted by any person whose protest pursuant to the Tariff Act of 1930, as amended, has been denied * * * ."

2. The enactment of the Customs Courts Act of 1980 does not require reexamination of the decision of the court of appeals.[4] As amended by Section 201 of the Customs Courts Act of 1980 (94 Stat. 1728), 28 U.S.C. 1581(a) provides that "the Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under Section 515 of the Tariff Act of 1930 * * *." This provision

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[3]Section 514 of the Tariff Act of 1930, 19 U.S.C. 1514, provides in part that "decisions of the appropriate customs officer, including the legality of all orders and findings entering into the same, as to—* * * (2) the classification and rate and amount of duties chargeable; [and] (3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury * * * shall be final and conclusive * * * unless a protest is filed in accordance with this section * * *." Proclamation No. 4074 delegated to the Secretary of the Treasury the authority to prescribe rules and regulations for implementing the supplemental duties at issue. Section 515 of the Tariff Act of 1930, 19 U.S.C. 1515, governs administrative review of protests and was, in effect, temporarily amended by Section 611 of the Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 2075. See S. Rep. No. 93-1298, 93d Cong., 2d Sess. 235 (1974).

[4]Under Section 701 of the Customs Courts Act of 1980 (94 Stat. 1747), all portions of that Act relevant to this case became effective on November 1, 1980, five days before the court of appeals rendered its decision.

"substantially restates" (H.R. Rep. No. 96-1235, 96th Cong., 2d Sess. 44 (1980)) the jurisdiction previously granted to the Customs Court under 28 U.S.C. 1582(a). Indeed, for the purpose of creating "a comprehensive system of judicial review of civil actions arising from import transactions" (H.R. Rep. No. 96-1235, *supra*, at 20), and "eliminat[ing] the confusion which currently exists as to the demarcation between the jurisdiction of the district courts and the Court of International Trade" (*id.* at 47), the Customs Courts Act of 1980 explicitly conferred on the Court of International Trade "a residual grant of jurisdictional authority" (*ibid.*) over "any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for— (1) revenue from imports or tonnage; [and] (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue * * * "(28 U.S.C. 1581(i), as amended by Section 201 of the Customs Courts Act of 1980 (94 Stat. 1729)). Moreover, with respect to 28 U.S.C. 1340, which specifically excepts from the district courts' jurisdiction "matters within the jurisdiction of the Customs Court," the only change made by the Customs Courts Act of 1980 was to substitute a reference to the Court of International Trade for the reference to the Customs Court. See Customs Court Act of 1980, Pub. L. No. 96-417, Section 501, 94 Stat. 1742. Thus, the Customs Courts Act of 1980 not only reaffirms the allocation of jurisdiction relied upon by the court of appeals, but "makes it clear that all suits of the type specified are properly commenced only in the Court of International Trade" (H.R. Rep. No. 96-1235, *supra*, at 47).

3. Only after the court of appeals had affirmed the district court's dismissal of their claims did petitioners seek transfer of the case to the Court of International Trade. See Pet. App. 22a. In support of their motion to alter the judgment, petitioners relied for the first time upon 28

U.S.C. 1584(a), as added by Section 201 of the Customs Courts Act of 1980 (94 Stat. 1729). The court of appeals properly denied petitioners' motion (see Pet. App. 21a).

a. 28 U.S.C. 1584(a) provides: "If a civil action within the exclusive jurisdiction of the Court of International Trade is commenced in a district court of the United States, the district court shall, in the interest of justice, transfer such civil action to the Court of International Trade * * * ." The legislative history shows that Section 1584 is "patterned after the provisions which govern suits in the Court of Claims" (S. Rep. No. 96-466, 96th Cong., 1st Sess. 13 (1979)). Although this Court has not had occasion to construe 28 U.S.C. 1406(c), the provision that governs transfer of cases from the district courts to the Court of Claims, the decisions of the lower federal courts have established that Section 1406(c) transfers are not a matter of right. Rather, the party seeking the transfer must establish that it is "in the interest of justice" to transfer the case instead of dismissing it. *Sherar* v. *Harless*, 561 F. 2d 791, 794 (9th Cir. 1977); *Eccles* v. *United States*, 396 F. Supp. 792, 796-797 (D. N.D. 1975). Cf. *Goewey* v. *United States*, 612 F. 2d 539, 541 (Ct. Cl. 1979); *Chicago Consortium, Inc.* v. *Brennan*, 599 F. 2d 138, 141 n.1 (7th Cir. 1979). Congress plainly intended that transfers under Section 1584 would also be committed to the discretion of the transferor courts. See H.R. Rep. No. 96-1235, 96th Cong., 2d Sess. 21, 50 (1980); S. Rep. No. 96-466, 96th Cong., 1st Sess. 13 (1979).

b. It is undisputed that petitioners never sought to have their claims transferred to the Court of International Trade until after the court of appeals had affirmed the district court's dismissal of those claims for lack of subject matter jurisdiction, some three years after petitioners had commenced their actions. See Pet. App. 22a. The courts have repeatedly held that the "interest of justice" is not served by transfers from the district courts to the Court of Claims

(rather than dismissal) where the party has unreasonably delayed in requesting such a transfer. See *Westside Property Owners* v. *Schlesinger*, 597 F. 2d 1214, 1220 (9th Cir. 1979); *United States* v. *Northern Colorado Water Conservancy District*, 449 F. 2d 1, 4 (10th Cir. 1971); *Peltzman* v. *Smith*, 404 F. 2d 335, 336 (2d Cir. 1968). Here, petitioners not only failed to request a transfer until after the court of appeals had rejected their jurisdictional arguments, but also expressly disclaimed any reliance (prior to the decision of the court of appeals) upon the Customs Courts Act of 1980, the source of Section 1584(a). See Pet. App. 48a-49a. Moreover, even when petitioners finally sought a transfer, they failed to show why that relief would be in the "interest of justice."[5] See Pet. App. 27a-30a. Cf. *Brown* v. *Grimm*, 624 F. 2d 58, 59 (7th Cir. 1980).

Finally, petitioners' reliance (Pet. 19-29) upon *Goldlawr, Inc.* v. *Heiman*, 369 U.S. 463 (1962), is misplaced. The Court there held that transfer of a case under 28 U.S.C. 1406(a) from an improper venue was not precluded by the failure of the transferor court to obtain personal jurisdiction over the defendant. However, the Court recognized in

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[5]Petitioners imply (Pet. 27-28) that they now seek a transfer to avoid a statute of limitations defense that might be raised if they were to refile their claims in the proper forum. Inasmuch as the record does not indicate whether petitioners ever filed protests with respect to the collection of the supplemental duties that they challenge, or whether any such protests were ever acted on, it is impossible to ascertain whether petitioners' claims would be cognizable at all (let alone barred by the statute of limitations) should petitioners now file suit in the Court of International Trade. See *Knickerbocker Liquors Corp.* v. *United States*, 432 F. Supp. 1347 (Cust. Ct. 1977); 28 U.S.C. 2636(a), as added by Section 201 of the Customs Courts Act of 1980 (94 Stat. 1734).

At all events, whatever procedural hurdles petitioners now face are the direct result of their own forum shopping. Petitioners candidly admit (Pet. 13) that they sought to invoke the jurisdiction of the district court "[i]n consequence of" the decisions of the Court of Customs and Patent Appeals sustaining the validity of Proclamation No. 4074.

Goldlawr that the plaintiff did not have an absolute right to a transfer. 369 U.S. at 466-467. See 15 C. Wright & A. Miller, *Federal Practice and Procedure* § 3827, at 169-170, 173 n.14 (1976).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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